No. 17,056

United States Court of Appeals

For the Ninth Circuit

MERRITT, CHAPMAN & SCOTT CORPORATION, a corporation, and THE SAVIN CONSTRUCTION CORPORATION, a corporation,

Appellants,

vs.

GUY F. ATKINSON COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

This litigation arose out of the construction of the Folsom Dam and Powerhouse Project for the United States Government. The project was located about 15 miles east of Sacramento on the American River, close to Folsom, California.

The Folsom Dam and Powerhouse Project was divided into two basic units: construction of the main dam; and construction of the powerhouse.

Construction of the main dam was performed by the Appellants, Merritt, Chapman & Scott-Savin Construction Co., under a contract with the Corps of Engineers; construction of the powerhouse, on the other hand, was performed by Appellee Guy F. Atkinson Company, under a separate contract with the Bureau of Reclamation.

The powerhouse site and the working area of Appellee Atkinson were situated just downstream from the main Folsom Dam. The working areas of the two contractors were separated by a concrete wall and cellular steel cofferdam, constructed by Appellee, and designed by it to withstand without damage all normal flows of the river, including overtopping in flood season (See Figure 1, inserted opposite, for a graphic representation of the actual physical layout).

Appellants Merritt-Savin's contract with the Corps of Engineers (Exhibit A-16C) and the accompanying Plans and Specifications (Exhibit A-16A) set forth in detail the dimensions of the *main* Folsom Dam, as well as the methods and the materials to be used in constructing it.

Additionally, the Specifications provided that, for the purpose of temporarily diverting and caring for the water in the American River during the construction of the main Folsom Dam, the main dam contractor (Appellants Merritt-Savin) were to construct an upstream and a downstream cofferdam. The original Specifications provided (in Paragraph 1-05) that:

> "The upstream and downstream cofferdams shall have a minimum crest elevation of 237 and

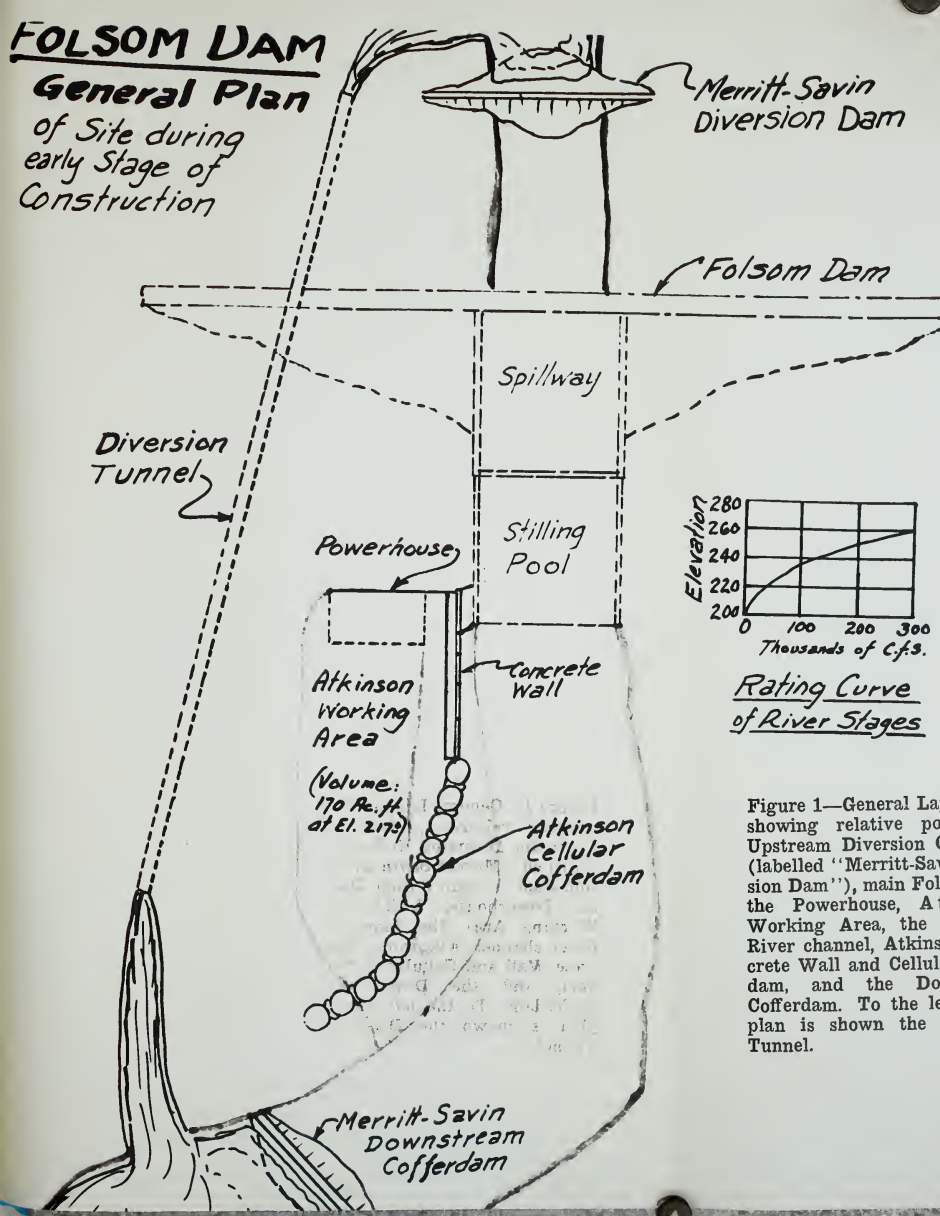

Figure 1—General Layout Plan showing relative position of Upstream Diversion Cofferdam (labelled "Merritt-Savin Diversion Dam"), main Folsom Dam, the Powerhouse, Atkinson Working Area, the American River channel, Atkinson's Concrete Wall and Cellular Cofferdam, and the Downstream Cofferdam. To the left of the plan is shown the Diversion Tunnel.

> 218 respectively, and shall be located at the locations indicated on the drawings."

Subsequently, on July 9, 1952, by Supplemental Agreement No. 1 (Exhibit M-20) one more requirement was added, as follows:

> "The upstream cofferdam shall not be constructed above elevation 250."

As to the upstream cofferdam, the plans and specifications were silent as to details, except for the reference to the minimum crest elevation, its general location, and eventually the permissible maximum crest elevation.

They did not require or direct anything of the Appellants as the main dam contractor. Nothing was required or directed as to the materials to be used, the construction methods to be followed, the sequence or order of construction, or any other detail.

Neither the Corps of Engineers, nor any of its employees prepared or submitted to Appellants any plan, or even any single drawing of the upstream cofferdam (Tr. 1045). Quite to the contrary, the Specifications (Exhibit A-16A, Paragraph 1-05) provided that:

> "Details of the proposed plans for diversion and for the design of the cofferdams shall be submitted to the Contracting Officer for information only . . . prior to commencement of the construction of the cofferdams."

Actually only one drawing of the upstream cofferdam was ever made. Appellants' Project Manager David E. Stinson conceived and prepared it (Tr. 767-

768). No other drawings or plans of the upstream cofferdam were ever prepared by anyone.

Prior to the execution of Appellants' contract with the Corps of Engineers, on December 8, 1950, the Contracting Officer, Lt. Col. C. C. Haug, wrote an interpretive letter (Exhibit G-29-A-1) stating that it was the intent:

> "to place the responsibility for diversion and de-watering on the Main Dam contractor except for the diversion tunnel."

This assignment of responsibility for diversion and de-watering to the main dam contractor (the Appellants) was never changed (Tr. 1037-1038) by any of the contract documents (which include the contract, the plans and specifications, Supplemental Agreement No. 1, and the change orders).

The upstream cofferdam (labelled Merritt-Savin Diversion Dam on Figure 1, opposite p. 2) was located upstream of the main Folsom Dam. It was also upstream of the Powerhouse and Appellee Atkinson's working area. The downstream cofferdam was below Appellee's working area. In practical effect, this arrangement resulted in locking the Powerhouse site and Appellee Atkinson's working area between the upstream diversion cofferdam and the downstream cofferdam.

On January 9, 1953, as flood waters from the freshly melted snow continued to accumulate behind the upstream diversion cofferdam, it collapsed. The collapse of the cofferdam released suddenly a great ava-

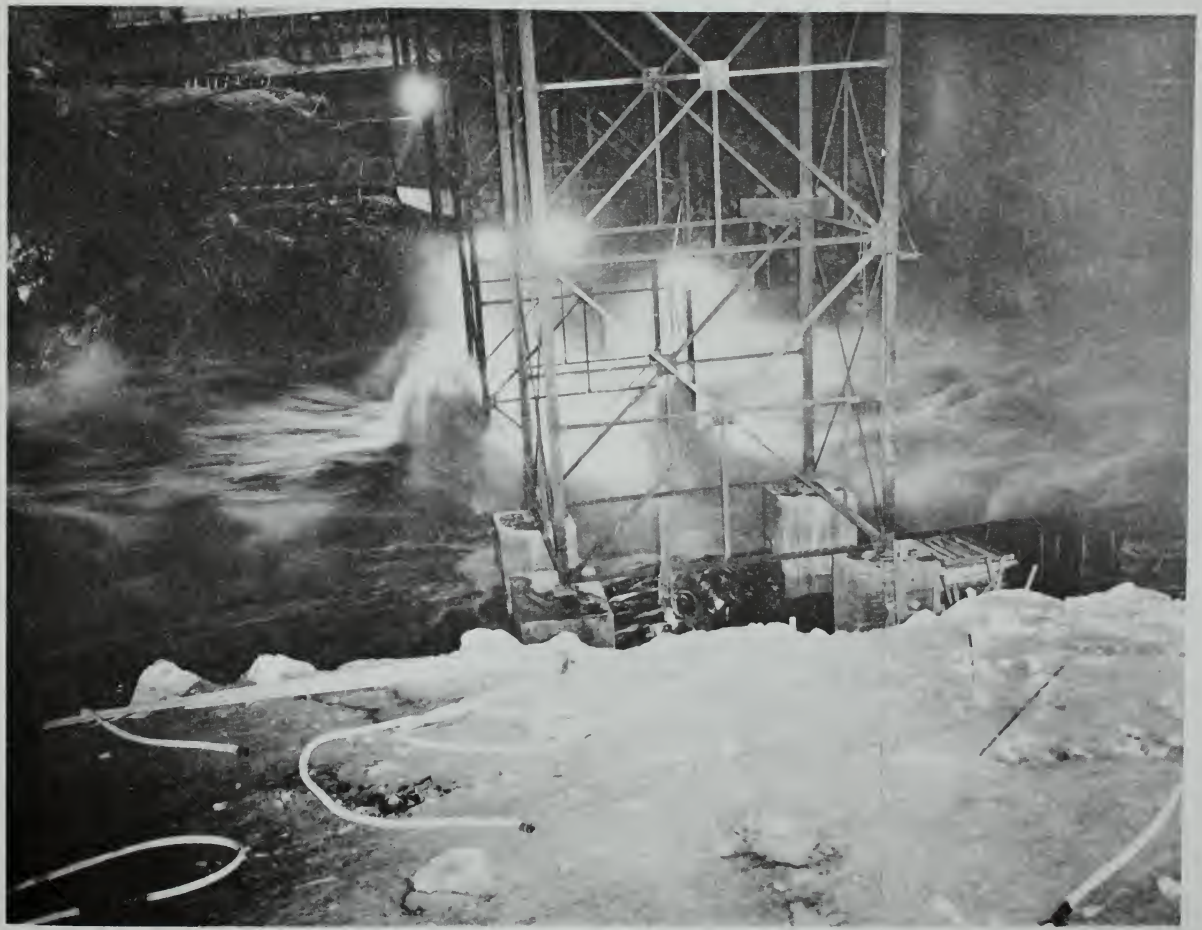

Figure 3—The violently churning avalanche of water has filled the entire river channel on January 9, 1953. The force is so violent that the water is being deflected upwards 20 to 30 feet on the steel legs of these Merritt-Savin towers. The attack on these towers was so severe that they gave way, and the entire trestle collapsed and tumbled into the river channel. (Tr. 890-891, 211-213, 191-193.)

Figure 2—Frontal wave of water rushing down the river channel on January 9, 1953, sweeping away lighting tower and carrying it downstream. (Tr. 889-890, 190-191.)

lanche of water which dropped from elevation 250 feet to 145 feet, or a drop of 105 feet, the equivalent of a ten story building (Tr. 864, 887). The vast avalanche, dropping that distance, and churning violently down the confined channel generated energy equivalent to three times that produced at Niagara Falls on the American side (Tr. 888).

The avalanche violently swept away and destroyed everything in its course (See Figure 2, inserted opposite). The impact of its blow was so powerful it even demolished Appellants' steel trestle from which concrete was poured (See Figure 3, inserted opposite). The wave of the avalanche, sweeping and scouring the channel bottom and sides, carrying and hurling large rocks, crashed with tremendous force against Appellee Atkinson's cellular cofferdam (Tr. pp. 413-414, 819-821) caving in and knocking over the first five cells, flooding the working area, and demolishing equipment still in the hole (Tr. p. 213).

Following the January 9th collapse of the upstream cofferdam, Appellants rebuilt it a second time. This was in May 1953. While it was still in the process of being rebuilt it collapsed again on May 20th, under the pressure of flood waters impounded behind it. On this second collapse, although the resultant flood was smaller and less violent than the January flood, it again flooded Appellee Atkinson's working area, caused damage to their construction site, and delayed the progress of their work (Tr. 233-240).

As a result of the two collapses of the cofferdam Appellee Atkinson commenced this action for the re-

sultant damages, charging that Appellants negligently designed, constructed, operated and maintained the upstream and downstream cofferdams. Specifically, Appellee Atkinson charged that Appellants were negligent in five separate respects. These were:

(1) Failure to select and use proper materials in the construction of the upstream cofferdam;

(2) Failure to install cut-off walls or collars, or to use special compaction, around the discharge pipes in the upstream cofferdam;

(3) Raising the upstream cofferdam from elevation 237 to 250 during the flood season;

(4) Maintaining the upstream cofferdam without a prudent plan for the controlled release of the water in the flood season; and

(5) Failure to breach the upstream cofferdam and the downstream cofferdam on the days of the floods.

Appellee Atkinson claimed total damages in the amount of $519,761.73. The jury, after hearing 18 days of trial, returned its unanimous verdict for $519,761.73.

Appellants acknowledge that:

> "The jury gave appellee a verdict for the full amount prayed for." (Brief for Appellants, p. 3)

They then label it "an enormous verdict." (Id., p. 42).

The jury's deliberate action in returning a unanimous verdict for the full amount prayed for (they

leliberated from 11:32 A.M. until 10:05 P.M.) could ıave been influenced by these very unique aspects of he 18-day trial:

(1) Appellants did not call as witnesses a single officer or principal of either Merritt, Chapman & Scott Corporation or Savin Construction Company.

(2) They did not produce in person at the trial one single responsible managing agent of either of the Appellant firms who was present during construction of the cofferdam, or on the days when the floods occurred.

(3) They did not produce in person at the trial one single witness who actually witnessed either flood, or who participated in any way in the construction of any of their cofferdams.

(4) The only testimony from any employee of either Appellant firm was submitted in the form of the reading of parts of two depositions.

(5) Appellants' whole case consisted of the reading of portions of three depositions, and the calling of two minor employees of the Corps of Engineers and one alleged expert witness.

(6) They failed to produce one single witness, or to present any affirmative showing of any kind, on the issue of damages (as to which they now complain).

SUMMARY OF ARGUMENT

I.

The court properly interpreted Appellants' contract documents as a matter of law, and ruled that in view of the stipulations and concessions of Appellants their alleged government contract defense was not pertinent.

II.

There was ample evidence to support the jury's award of damages to compensate Appellee for the items of damage incurred by it and designated as "Loss of job momentum and interference with job efficiency" and "Premium time, and other costs to avert 1954-55 Winter losses."

ARGUMENT

I.

THE COURT PROPERLY INTERPRETED APPELLANTS' CONTRACT DOCUMENTS AS A MATTER OF LAW, AND RULED THAT, IN VIEW OF THE STIPULATIONS AND CONCESSIONS OF THE APPELLANTS, THEIR ALLEGED "GOVERNMENT CONTRACT DEFENSE" WAS NOT PERTINENT.

1. The Appellants State and Re-State Only One Single Issue—Their Alleged "Government Contract Defense."

Other than attacking the amount of certain items of damages, Appellants raise only one question in their Brief (p. 3).

Basically their point is that whatever they did or did not do that might have constituted negligence, was done or not done because they were bound under their contract with the government.

Upon this sole contention they base what they choose to label the "government contract defense."

They state and re-state this identical position time and again, as if merely repeating it ad infinitum will breathe life and substance into the claim.

To show how devoid of substance the Brief for Appellants really is, may be done by listing seriatim the many repetitions of this one identical claim:

(1) "Appellants contend that they were bound under their contract with the government to leave the cofferdam in as they did." (Brief for Appellants, p. 3)

(2) "Which would have afforded to Appellants the defense that they acted in compliance with their contract with the government." (Id., p. 4)

(3) "Appellants pleaded that they were not liable because they had acted in compliance with the contract and directives of the government." (Id., p. 8)

(4) "In which latter two respects they were bound by the contract and directives of the government." (Id., p. 10)

(5) "Appellants contend they were not free, but were bound by the contract to leave the cofferdam in as they did." (Id., p. 11)

(6) "Were we required by the contract and directives of the government to leave the upper cofferdam in as we did?" (Id., p. 12)

(7) "We are looking at it to see if it did not require compliance by the contractor with government directives." (Id., p. 19)

(8) "Whether appellants' actions on the day of the flood were done in compliance with the contract as required by it." (Id., p. 23)

(9) "We were bound under our contract not to do so. On the day in question the government directed us not to do so." (Id., p. 25)

(10) "The only question is whether we were bound under the contract to defer breaching until the government consented." (Id., p. 26)

(11) "Numerous provisions of the contract lead to the conclusion that Appellants were bound by government directives on the matter." (Id., p. 27)

A. The Nature of Their Alleged "Government Contract Defense."

Stripped of all repetition, the one simple issue raised by Appellants is the claim that they were exempted from liability for negligence because their actions were taken, or their omissions committed, in compliance with their contract with the Corps of Engineers. That is all there is to what they choose to term the "government contract defense."

Appellants concede that to make it applicable, they must show that, by the contract terms, they were *bound* or *required* to do the acts which Appellee Atkinson charged to be negligence.

This is where the parties take issue (incidentally it was on this specific point that the trial judge eventually "parted company" with Appellants. Tr. 1394). The Appellants contend that they were *bound* or *required* to perform the acts charged as negligence. The Appellee Atkinson contends, to the contrary, that as to all of the acts charged and proved as negligence, the Appellants *had the unlimited discretion to do or not to do them,* and that there was nothing in Appellants' contract with the Corps of Engineers that required them to act other than as reasonably prudent contractors in their diversion of the American River.

B. The Provisions of the Contract Documents Do Not Support Their Contention.

Appellants' prime difficulty at the trial, and again upon this appeal, is to find in the provisions of their contract with the Corps of Engineers any support for their position.

They attempt to list the contract document provisions that they assert *required* them to perform the acts charged as negligence. (Brief of Appellants, pp. 13-23) This effort at listing the "government directives" set forth in the contract documents produces only references to such thoroughly orthodox and entirely routine clauses as the usual ones:

Requiring the contractor "to prosecute the work with faithfulness and energy";

Requiring "progress reports"; and

Allowing the Corps to "order extras or make changes".

Nowhere in their Brief were the Appellants able to point to any single clause or combination of clauses from the contract documents that required or directed them to defer breaching, or to leave the cofferdam in place as long as they did, or to leave it at elevation 250.

2. Under the Contract Documents the Appellants Had Complete Discretion in Performing the Specific Acts Charged as Negligence.

A concise review of what the Appellants actually did in the design, construction, operation and maintenance of the upstream diversionary cofferdam and the downstream cofferdam will be of assistance in analyzing the relationship of the acts and omissions charged as negligence to the requirements, or lack of them, in the contract documents.

A. Appellants Had Discretion in the Design.

The only drawing or plan of the upstream and downstream cofferdams was a single sheet drawing entitled "Merritt-Chapman-Scott & The Savin Co.—Details of Scheme for Diversion and Care of Water" (Exhibit A-55). This scheme or plan for diversion and care of the water was conceived by David E. Stinson, Appellants' Project Manager, and the drawing was made by Leslie G. Sumner, Appellants' Project Engineer (Tr. 767-769).

The drawing called for a rock-fill at the upstream toe with an earth fill blanket on the front of it. The rock-fill, according to the plan, would have extended two-thirds of the way to the crest at elevation 237 (Tr. 647-649, 850-851).

Actually, the cofferdam that was built was not a rock-fill dam. It was a very different type of structure than the drawing called for (Tr. 649, 851). It did not have the separation of rock-fill and earth fill as indicated on the drawing (Tr. 851). It was simply an unconsolidated, random fill of disintegrated granite, sand, earth and rock (Tr. 649). It was aptly described by O. W. Peterson, one of Appellee Atkinson's two expert witnesses, as follows (Tr. 650):

> "I mean that it was built without any—it was built a good deal like Topsy; it just grew. *They have earth and they have rocks like pudding stones in the earth—like you might find an occasional plum or raisin in a pudding*—and they have some rock downstream—they have some rock toe, and a little rock on the paving, but I looked at the pictures and *it's essentially an earth dam with some rock mixed in it and some rock blanketing, although at the abutment that remained, I see little or no rock blankets. It is not a—the word 'random' was used in a report that I saw of this, and I thought it was an excellent description because that means built by chance, without any* [815] *effective object in mind, apparently.*"*

David E. Stinson, Appellants' Project Manager, did not appear at the trial, but use was made of part of his deposition in which he testified that his organization built this upstream diversionary cofferdam by simply picking up a mixture of rock and dirt from a dump pile, then hauled it in trucks and dumped it into the river without compaction or sorting of any kind (Tr. 777).

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*Throughout this Brief, emphasis is added unless otherwise noted.

B. Appellants Had Freedom of Selection of the Materials Used.

The material used was selected by Stinson. The Corps of Engineers had nothing to do with the decision as to type or source of the material used in the cofferdams. This was made clear by Stinson in his deposition as read at the trial (Tr. 778):

> "*Was this source of material designated by* the United States Corps of Engineers, sir?
>
> A. No, it was not.
>
> Q. This was a source that you found yourself and you decided to use in the construction of the cofferdam?
>
> A. It was there.
>
> Q. It was there?
>
> A. We didn't have to find it. It was there. We just excavated it and put it in there.
>
> Q. *Did you make the decision to use the material at this particular source?*
>
> A. Yes."

C. Appellants Voluntarily Added the Sheet-Piling Cut-Off Wall.

The drawing of the "Scheme for Diversion and Care of the Water" did not call for a sheet-piling cut-off wall in the upstream cofferdam. Nonetheless, one was placed near the downstream toe. Stinson made the decision to place it there (Tr. 781). His purpose was to try to cut off some of the seepage underneath the dam. He was asked about the location of leakage (Tr. 782):

> "Q. Could you pinpoint the locations at which this leakage occurred?
>
> A. *Most all the way over. Practically the whole damn coffer.*"

Both of the experienced engineers called as expert witnesses by Appellee Atkinson testified about the effect of the placing of this sheet-piling cut-off wall. Adolph J. Ackerman stated his position (Tr. 853):

> "Q. What was the effect, sir, under normal construction practices and known engineering experience—what was the effect actually of driving those sheet piles on the downstream side rather than upstream or in the dam itself?
>
> A. Well, *the location of that sheet piling violated the most elementary principles with respect to control of percolation through earth dams.*"

Similarly, Otto W. Peterson gave his experienced comment (Tr. 651):

> "A. Well, that was not a favorable reference. *I don't want to be too critical, but it violates every principle of practical dam construction or engineering design.*"

D. The Appellants Provided the Discharge Pipes.

Certain large pipes, designated as "discharge pipes", were laid on the downstream face of the upstream cofferdam by the Appellants, and then carried clear through the cofferdam at approximately elevation 234. These pipes were placed through the cofferdam just before it was completed to elevation 237. (See Exhibits A32-33, A35, A38, A42). They were placed there by Appellants for the purpose of removing seepage water from the lower working area (Tr. 779, 854-855).

Stinson testified that no measures were ever taken to compact the earth around the discharge pipes. No

collars were placed around the discharge pipes, nor was any thought ever given to placing them. No cut-off walls were placed around them (Tr. 779).

Both of the expert witnesses produced by Appellee Atkinson testified that the placement of these discharge pipes through the cofferdam without collars, cut-off walls, or even compaction, resulted in the cofferdam retaining a serious point of weakness at elevation 235, so serious that the effective height of the dam corresponded to the level of the pipes. Their testimony was that the pipes would provide an easy avenue of outlet for the water, that a progressive movement would develop, and eventually there would be a collapse resulting from the tunneling away along the pipes (Tr. 689-691, 855-856).

On this point, two of Appellants' witnesses admitted that impounding water behind the cofferdam up to elevation 249 with the discharge pipes in place at elevation 234, without protective collars or cut-off walls, was not sound construction practice or good engineering procedure (See Jack D. Brooks' testimony Tr. 1057, and Mac Silbert's answers Tr. 1328-1329).

The undisputed testimony showed that on January 9th, as the impounded water rose behind the cofferdam, heavy seepage started along the discharge pipe lines. It increased until craters began to develop in the region of the pipes. Then there were cave-ins near the pipes, and finally the cofferdam collapsed in the area of the discharge pipes (Tr. 208-210, and see Exhibit AMG-1, pp. 3-4).

E. The Appellants Increased the Elevation of the Upstream Cofferdam From 237 to 250 Without Any Direction From the Corps of Engineers.

In connection with the collapse of the dam, it is pertinent to note that, as Mr. Adolph J. Ackerman pointed out, the cofferdam was already failing on January 9th when the water was at elevation 235, the level where the discharge pipes were located. With the water at that level, the seepage was serious enough that the cofferdam was already "bleeding to death" (Tr. 875-876). Mr. Otto W. Peterson confirmed this opinion (Tr. 662-663).

On December 14, 1952 Appellants had raised the crest of the upstream cofferdam from elevation 237 to 250, by dumping on more of the same type of unassorted material used previously. It came from the same stockpile or dump. (Tr. 697, 782).

Mr. Peterson testified as to the decision to raise the cofferdam crest to elevation 250 on December 14th, right at the start of the flood season. He said (Tr. 659):

> ". . . And by raising that dam right at the time that the flood season was to start—when even the lower dam should have been breached—*it was a case of moving forward into positive disaster in a normal winter in the Sierras*"

Mr. Ackerman offered detailed engineering data as to the consequences of raising the cofferdam from elevation 237 to 250 during the flood season. He stated that this change would increase the storage of water behind the dam from 1990 acre-feet to 6875, or an

increase of 3½ times in volume. In terms of tonnage of water the increase was from 2,700,000 tons at 237 feet to 9,300,000 tons at 250, or an increase of 6,600,000 tons by adding 15 feet to the height of the cofferdam. The energy released when the impounded water broke free in avalanche proportions amounted to 400,000 horsepower, three times that produced at Niagara Falls on the American side (Tr. 884-888).

Mr. Ackerman testified that such action on the part of Appellants was not a compliance with normal construction methods. He said (Tr. 892-893):

> "Q. . . . Having in mind the conditions that existed [1173] on January 9th at Folsom Dam, particularly at the Merritt-Savin upstream cofferdam, was the action of the contractor, Merritt-Savin, in allowing the water to pile up and become impounded behind the upstream cofferdam to approximately 250 elevation, without taking any steps to breach the cofferdam or release the impounded waters, a compliance with normal construction methods?
>
> A. No, it was not.
>
> Q. Would you explain the factors that contributed to the actual collapse of the Merritt-Savin cofferdam?
>
> A. Well, from the diagrams, as I have described them, there was, first of all, an apparent lack of appreciation of the tremendous force which was being built up behind that diversion dam. Secondly, there appeared to be a complete lack of appreciation of the volume of water which was accumulated above elevation 235 and the consequences which would develop if that volume of water became uncontrollable and were released

suddenly into the work area. Thirdly, there was a lack—it has been a mystery to me, but for some reason that cofferdam was permitted to accumulate water after it became quite obvious it was in the process of failing due to percolation. The concepts of what happens in an earth dam in terms of seepage through it which are immediate signs of incipient failure seem to have been completely ignored."

F. No Contract Provision Required Appellants Not to Breach, or Denied Them the Right to Have a Plan for Controlled Release of the Water.

As to the need for a plan to control the release of the water when a flood was impending, Mr. Ackerman testified that once it became evident that the water would rise to a height where the upstream diversionary dam would overtop or collapse, preparations should have been made to bring in equipment to breach the cofferdam. One or two bull-dozers would have been sufficient (Tr. 882).

He stated that, under normal construction methods, the breach would have been made near the left abutment (Tr. 883).

Appellants had no plan for the controlled release of the waters in the face of the flood. Stinson's deposition, as read at the trial, developed that there was no plan for breaching the upstream cofferdam (Tr. 793-794).

Both Mr. Ackerman and Mr. Peterson also testified that normal construction practices would have required the breaching of the downstream cofferdam

first, so as to allow the water to fill the basin up to the toe of the upstream cofferdam, thereby braking the velocity of the water being discharged from the upstream cofferdam. (Tr. 696, 869-870). This was not done by Appellants on January 9th prior to the collapse of the upstream cofferdam.

Mr. Ackerman testified that, had Appellants first breached the downstream cofferdam, it would have reduced the accumulated pressures and destructive forces by 90%. (Tr. 903-904)

3. The Appellants Make Concessions That Render Their "Government Contract Defense" Inapplicable to Certain Charges of Negligence, and Their Proposed Instructions on That Subject Improper.

A. In Their Brief Appellants Concede That They Had Complete Discretion as to Three of the Charges of Negligence.

Appellants' treatment of the various charges of negligence discloses the utter desperation of their position upon this appeal.

They list "The Claims of Negligence" at the opening of their "Argument" (Brief for Appellants, p. 7). They spell them out as follows:

> "(1) Faulty materials in the upstream cofferdam;
>
> (2) Faulty protective covering around discharge pipes in the cofferdam;
>
> (3) Raising the cofferdam from elevation 237 to 250 in the flood season;
>
> (4) Maintaining it without a prudent plan for controlled, safe release of water in the flood season; and

(5) Failure to breach the cofferdam (also the lower cofferdam) on the day of the flood."

Then, they make the following damaging concession (Id., p. 10):

"Appellee contends—and the trial court concurred—that in respect of all the items of claimed negligence, appellants had discretion, under their contract, to do what they did. Appellants, on the contrary, contend that *while they did have such discretion with respect to the first three items of claimed negligence,* namely, the character of materials in the upstream cofferdam, the insulation of the discharge pipes, and the height of the cofferdam (within the range of elevation 237 to 250), *they did not have discretion in respect of the remaining two claims of negligence, namely, lack of a plan for control of the water, and failure to breach the cofferdam, in which latter two respects they were bound by the contract and directives of the government.*"

So, at the inception of their Brief, in this one paragraph, Appellants confess that, as to three out of the five charges of negligence, there was no basis for the application of their "government contract defense", since admittedly they had the uncontrolled discretion as to the commission of the acts and omissions upon which these three charges were based.

It must be emphasized that, at the trial, Appellants did not take any such an objective (or possibly, selective) view of the various charges of negligence. Right up to the final days of the trial they were busily charging that the "government contract defense" ap-

plied sweepingly to all of Appellee Atkinson's charges of negligence. (Tr. 1391-1393).

Even more important, and fatal to their position on this appeal, their proposed "Instruction No. 13 (Subject: Governmental Defense Doctrine)" (Brief for Appellant, Appendix i-ii) was not qualified so as to apply only to the charge of negligence based upon failure to breach the cofferdam and the charge relating to lack of a plan for the controlled release of the water. It was all-inclusive in its wording, so as to encompass all of the charges of negligence.

Patently, in view of the qualified position now taken by Appellants, they can no longer seriously urge that it was error on the part of the trial judge to refuse to give their Instruction No. 13 in the form in which it was presented.

Nonetheless, Appellants specifically urge that the refusal of the trial judge to give this instruction in the form in which they presented it was error. (Brief for Appellants, pp. 4-5).

B. At the Trial the Appellants Stipulated That They Were Not Ordered to Increase the Elevation of the Upstream Cofferdam.

At page 10 of their Brief the Appellants still contend that, as to two of the charges of negligence (failure to breach the cofferdam, and lack of a plan for the controlled release of the water), they did not have discretion, but "were bound by the contract and directives of the government."

They did not maintain their position very long on the "failure to breach" charge, for at page 17 of their Brief they concede again:

> "So the contract (as amended) provided that the upper cofferdam should not be less than 237 or more than 250 elevation. *Merritt-Savin had discretion to erect it anywhere within those limits".*

This concession of a further discretion vested in the Appellants is explained only by a foot-note referring the reader to "T. 1086, 1087".

What a casual manner of portraying a crucial colloquy between the trial judge and counsel that fills pages 1073-1087 of the Transcript, and which resulted in the following explanatory statement by the trial judge (Tr. 1086-1087):

> "The Court: The record will show that the jury is now present and seated in the box, and that the witness, Mr. Brooks, is on the stand.
>
> Now, ladies and gentlemen, at the time we concluded yesterday, Mr. Johnson was cross-examining the witness, and he will continue with the cross-examination. But one of the reasons we have delayed starting this morning is that we had a hearing on a stipulation of fact which I think may shorten this cross-examination and take out of the case discussion about one factual issue. *The parties have stipulated that neither the Contracting Officer for the Corps of Engineers*—[*1592*] *and that, in order to identify that person, was Colonel Haug—nor any other authorized representative of the Corps, either directed or ordered the increase in the elevation of the upstream cofferdam from elevation 237 to elevation 250.*
>
> Now this is stipulated to by the parties, and you may accept this stipulation of fact as being

> proof of the fact stipulated to, without any further evidence in the matter. Now this stipulation, then, will remove from the case the arguments about who ordered the increase in the elevation in that it removes any element in the case that the Contracting Officer of the Corps or any agent of the Corps ordered it increased from the elevation 237 to elevation 250. In order to relate this, I will simply say *that in the plans and specifications for the dam, there is the minimum elevation of 237 and the maximum elevation of 250 provided, so that the contractor who had the duty to build the related structures to building the dam had the authority to build the dam anywhere from elevation 237 to 250.* Now this will remove that area of fact from examination and cross-examination."

Appellants did not object or except to any portion of the Court's statement. To the contrary, they stipulated to it.

So here again, Appellants have conceded that they had the unlimited discretion; in this case the unlimited discretion to build the cofferdam anywhere from elevation 237 to 250. As to the act of increasing it from 237 to 250 on December 14, 1952, they stipulated that "neither the Contracting Officer, Colonel Haug, nor any other authorized representative of the Corps of Engineers, either directed or ordered the increase."

This voluntary act on Appellants' part, in making the increase on December 14, 1952, was what Mr. Otto W. Peterson referred to when he said:

"By raising that dam right at the time that the flood season was to start—when even the lower dam should have been breached—*it was a case of moving forward into positive disacter in a normal winter in the Sierras.*"

C. The Contract Documents and Other Evidence Proved That Appellants Had the Responsibility for Diversion and De-Watering.

From the outset of the trial the Appellants made clear their intention of relying upon what they termed the "government contract defense."

They referred to it throughout their opening statement (Tr. 120, 127, 136-138, 145, 147, 149-150, 157-158). It was the basis of their proposed "Instruction No. 13, Subject: Governmental Defense Doctrine" as presented at the opening of the trial.

The trial judge received in evidence as contract documents, among others, the following:

(1) The original contract between Appellants and the Corps of Engineers dated September 13, 1951 (Exhibit A-16-C);

(2) The original Specifications No. 1532 (Exhibit A-16-A);

(3) Supplemental Agreement No. 1 dated July 9, 1952 (Exhibit M-20);

(4) Change Order No. 9 dated November 3, 1952 (Exhibit M-23); and

(5) Change Order No. 15 dated February 16, 1953 (Exhibit A-66).

Evidence was received as to the action taken under them. Evidence was also received as to the responsi-

bilities of the parties under the provisions of the contract documents.

For instance, there was introduced in evidence (as Exhibit G-29-A-1) a letter of December 8, 1950 from the Contracting Officer, Lt. Colonel C. C. Haug, stating that it was the intention:

> ". . . to place the responsibility for diversion and dewatering on the Main Dam contractor . . ."

Concerning this document, Appellants' witness Jack D. Brooks (Assistant Chief of the Design Branch of the Corps of Engineers) testified as follows (Tr. 1037-1038):

> "Q. . . . And who was the main dam contractor?
>
> A. Savin Construction, Merritt, Chapman & Scott and Savin.
>
> Q. *So that it was their responsibility to divert the stream and dewater the project, wasn't it?*
>
> A. *Within the scope of the specifications.*
>
> Q. *And that was never changed, was it, sir?*
>
> A. *No.*
>
> * * *
>
> Q. (By Mr. Johnson): *Now, neither Col. Haug nor any other representative of the Corps of Engineers ever changed that assignment of responsibility, did they; that is, that it was upon the main dam contractor?*
>
> A. *Except as covered by Supplemental Agreement No. 2, or No. 1.*
>
> Q. *That didn't change it, sir?*
>
> A. *Not the responsibility.*"

Appellee Atkinson's expert engineering witness, Mr. Adolph J. Ackerman, was in accord with Brooks.

Asked if he understood what the same letter meant, he replied (Tr. 843-844):

"A. *Yes. It means that the river handling was at one time considered as possibly a portion of the responsibility of the awarding agency, or the Corps of Engineers; but in keeping with their usual contracting practice, they have decided to place this responsibility on the contractor for the dam.*

Q. That letter which was written on December 8, 1950, is consistent in that respect—on construction practices—with the actual specification as it appears in Exhibit A-16A?

A. That's right.

Q. *Now, Mr. Ackerman, there has been a lot of conversation in this case about Government plan or Government design, Corps plan or Corps design. Is there anything in either of those exhibits or in any other document that you have examined that specifies that the Government or the Corps shall be responsible for diversion or control of the water?*

A. *No, there is nothing that specifies that, except that the Government has provided a diversion tunnel to carry the small discharges during the dry season.*

Q. Well, as indicated in Colonel Haug's letter, the diversion tunnel was the only facility for river diversion or control provided by the Government, isn't that correct?

A. That's right."

As we have pointed out previously (supra, pp. 11-12), Appellants attempted in their Brief (pp. 13-23) to list the provisions from the contract documents that

required or *bound* them to defer breaching the cofferdam, to leave it in place as long as they did, or that required them to maintain it at elevation 250.

They were unable to point to any one or more contract provisions requiring or directing them to take such action. Typical of their failure to find any support for their position was their effort to rely upon sub-Paragraph SC 42-f of the Specifications. They quote the whole sub-paragraph at page 18, in support of their claim that, because of the use of the word "overtopping", they were required to maintain the upstream cofferdam at elevation 250 and therefore could not breach it.

Their contention was not supported by a reading of that sub-paragraph, or any other paragraph, of the contract documents. Nowhere in sub-Paragraph SC 42-f was there any requirement that the crest of the dam was to be maintained at elevation 250, or that "overtopping", if there was to be any, must necessarily occur at elevation 250. During his rebuttal testimony, this was pointed up, without objection, by Mr. Ackerman, in the following manner (Tr. 1612-1613):

> "Q. Is it true, sir, that under the specifications which I am holding in my hand, Merritt-Savin's specifications, that the main dam contractor, Merritt-Savin, had the absolute, unlimited discretion for moving the elevation of the cofferdam up and down between 237 and 250?
>
> A. For lowering or raising the crest, you mean?
>
> Q. Yes.
>
> A. *Yes.*
>
> * * *

Q. (By Mr. Johnson): In other words, Mr. Ackerman, what I wanted to bring out was that under the specifications, the contractor had the discretion without limitation to raise the cofferdam from 237 to 250, or to take it back down.

A. That's right.

Q. He didn't have to get any permit from the United States Corps of Engineers to do that, did he?

A. No, he did not.

Q. And is it your testimony then that cutting such a breach in the left abutment prior to the rise of the water above 237 would be normal, prudent construction methods and practices?

A. Yes, it would be."

4. The Court Properly Interpreted the Contract Documents as a Matter of Law, and Ruled That the "Government Contract Defense" Was Not a Germane Issue.

It was Appellants who raised the issue of the so-called "government contract defense." To Appellee Atkinson's several charges that they were negligent:

> "Appellants pleaded that they were not liable because they had acted in compliance with the contract and directives of the government" (Brief for Appellants, p. 8).

Plainly, whether or not their claimed defense had any substance depended exclusively upon a proper interpretation of their contract with the Corps of Engineers.

Accordingly, the trial judge received into evidence the contract documents and testimony as to the action of the parties taken under them. There was

also testimony explaining the extent of the responsibilities of the parties under the contract documents.

Eventually, three days before the case was argued to the jury, the trial judge set aside a morning session for a discussion of the proposed instructions (commencing at Tr. 1362). At that session he reviewed at considerable length the theories of both parties, and indicated his proposed methods of disposing of them in the instructions.

Concerning Appellants' assertion of the "government contract defense" and the evidence received to develop this theory, he commented (Tr. 1401):

> "The Court. . . . The theory upon which I have permitted evidence and the evidentiary approach to the matter, it seems to me, turns on the question of whether or not the conduct of parties, in acting on custom and practice in an engineering situation would depend upon their knowledge and understanding of terms that were used."

The trial judge pointed up very clearly the main point that had to be determined, when he said (Tr. p. 1393):

> "The Court. Yes, I see this, Mr. Driscoll, but let me ask you this: And the key to that is as to whether or not you had to maintain that structure until it was overtopped under the plans and specifications. Isn't that the key argument?
>
> Mr. Driscoll. That is one of the key arguments, that's correct.
>
> The Court. Isn't it the key one?
>
> Mr. Driscoll. Yes, it is, your Honor."

Having pointed up the key question, and obtained Appellants' counsel's accord, the Court discussed the true interpretation of that crucial question (Tr. 1394-1395):

"The Court. That's right, and the specifications are clear that you have the authority to build that dam between the height of 237 and 250. I don't think Mr. Johnson will quarrel with your duty to build it to at least 237.

Mr. Driscoll. Right.

The Court. And no one will quarrel with that.

Mr. Driscoll. That's right, your Honor.

The Court. That is, the specifications called for that. *But between the area of 237 and 250, the specifications* [*1940*] *allow you to do it, and this is an area of discretion for you. If you exercise that discretion badly, or wrongfully, then that is negligence on your part, not on the part of the Government.*

Mr. Driscoll. If we build it wrongfully, it is negligence.

The Court. If you exercise the discretion negligently.

Mr. Driscoll. We are still following the plans and specifications, your Honor.

The Court. This is where we part company. That is number one, right there. Now, number two, and the one that is far more difficult for me, because I think here is where *you have an area of discretion between 237 and 250, and I think your stipulation puts you in that area, and there is nothing you can do about it. This is your responsibility* and not to say that you did it badly; but as a matter of fact, this is an area of responsibility which is within the discretion of the contractor."

The trial judge indicated his deliberative treatment of the question at hand, when he said (Tr. 1397):

> "The Court. . . . I believe this has to be resolved, that is what the nature of the case is, before we can come to the answer about which we have been talking. And that is the interpretation of the contract. And when I say, 'the interpretation of the contract,' I mean the contract with its supplemental orders, its change orders and its amendments—the whole thing, as it was in existence as of January 9th. Now, [1943] is the legal effect of that contract a question of fact or a question of law?"

Having indicated the nature of the problem before him, and his method of solving it, the Court interpreted the contract as follows (Tr. 1410):

> "The Court. . . . I have to make the basic decision and *my first impression here is that this government contract defense or governmental defense doctrine, in view of the concessions of the party, is not realy a germane issue. And I suppose I am influenced in that by two or three of the stipulations and positions that the parties have taken without equivocation.*"

(Tr. 1412):

> ". . . *I am certainly going to instruct that the question of raising the dam was within the discretion, that is, raising it in elevation.* I am certainly going to instruct that the materials that were to be used was within the discretion. *I am certainly going to instruct that the question of how the dam [1960] should be operated above elevation 237 was within discre-*

tion. That includes overtopping and everything else, in my opinion. *That seems to me to be my approach to the law of this case."*

(Tr. 1414):

"*. . . It is my view that overtopping is a matter on which I have to rule as a matter of law on the basis of my understanding of the language that that was not mandatory, you didn't have to overtop, you had discretion to either keep it there or you could do what you wanted to do down to the level of 237; that you were bound by that by the contract,* and all of these other items that go to the matter of construction, they are all lumped into one. That is the way I see it, Mr. Driscoll, and, Mr. Johnson, if you will prepare instructions along that line——"

5. Controlling Legal Authorities Support the Position That the Interpretation of the Contract Documents Was a Matter of Law for the Court, Not the Jury.

The trial judge recognized that, under the law, it was the responsibility of the Court to make a ruling interpreting the contracts according to his understanding of the pertinent language. He stated a number of times his strong belief that (Tr. 1398):

"I don't think there is a thing in the contract that would prevent you from breaching it at any time you wanted to as long as you didn't put it down below 237" (See also Tr. 1407, 1412, and 1414).

During this entire colloquy, when the trial judge had indicated so clearly his intended interpretation, Appellants did not point to a single provision in the

contract documents requiring them to maintain the upstream diversionary cofferdam at elevation 250, or even requiring that if there was to be "overtopping", it should occur at elevation 250.

To the contrary, their own stipulation supported the trial judge's ultimate interpretive ruling that, between elevations 237 and 250, they had the unlimited discretion to build it up, take it down, breach it, or otherwise maintain it free of direction or control by anyone (Tr. 1394, 1395).

The rule is well-settled that the construction and interpretation of written instruments is for the trial court and not the jury.

See:

Hawkins v. Frick-Reid Supply Co. (1946, C.A. 5) 154 F. 2d 88, 89;

Trans World Airlines, Inc. v. The Travelers Indemnity Company (1959, C.A. 8) 262 F. 2d 321, 326;

R. P. Farnsworth & Co. v. Tri State Construction Co. (1959, C.A. 5) 271 F. 2d 728, 733.

In the *Trans World Airlines* case (supra) the airlines, as a lessee of air base facilities, sued contractors and sureties to recover damages under the contract for failure to complete the project within the stipulated time. The trial court construed the contracts, ruling that the liquidated damages provisions therein precluded recovery for actual damages sustained for delay. On appeal, the airlines argued that the trial court's interpretation "ignores the clear agreement of

the parties" and thereby raised the issue that the terms of the contracts were ambiguous. The Court of Appeals held that there was no ambiguity in the terms of the contracts saying (p. 326):

> "The question as to whether an ambiguity exists in a contract *is to be determined by the court as a matter of law.* 17 C.J.S. Contracts § 617; *Whiting Stoker Company v. Chicago Stoker Company,* 7 Cir., 171 F.2d 248; *Golden Gate Bridge & Highway District of California v. United States,* 9 Cir., 125 F.2d 872."

It is further established that the construction of the contract is for the trial court even though the court has permitted and heard extrinsic evidence as to the meaning and purpose of certain technical words. In the *Farnsworth* case, supra, the Court of Appeals for the Fifth Circuit upheld the construction of a contract by the trial court as a matter of law notwithstanding the meaning of some of the technical terms in the contract were questions of fact saying (p. 733):

> *"The construction of the written contracts was, of course, for the court,* though factual issues were presented as to the meaning and purpose of certain technical words and ambiguous terms, such as 'pilot house' and 'shop drawings.' "

It is also settled that the mere assertion by one of the parties to a contract that the provisions of the contract are ambiguous is not sufficient as a matter of law to support the conclusion that an ambiguity existed. In *National Pigments & Chemical Co. v. C.K. Williams & Co.* (1938, C.A. 8) 99 F.2d 792, 795, the

court rejected the suggestion that a disagreement between the parties on the interpretation of contract terms is grounds for concluding that an ambiguity exists. The Court formulated general guidelines for testing the existence of such ambiguity as follows (p. 795):

> "While the record sets out the history of the dealings of the parties from 1926 until 1934 under the contract, both parties agree that their provisions are unambiguous, and that the point is to be settled by a proper construction of the instruments themselves. *They are not rendered ambiguous by the fact that the parties do not now agree upon the proper construction to be given them. They were deliberately entered into, the language is clear, and its meaning can easily be determined from a consideration of the simple and harmonious facts with which they deal.*"

6. The Court's Rulings Upon the Instructions Were Proper.

A. Plaintiff's Proposed Instruction 30B Was Merely a Proper Interpretation of the Contract Documents.

As has been pointed out, during the discussion of the proposed instructions, the trial judge recognized that it was his responsibility to interpret the contract. He went on to outline some of the specific points that he intended to cover in this interpretation, and directed that appropriate instructions should be prepared by Appellee Atkinson's counsel. (Supra, pp. 30-33).

One of the instructions prepared as a result of that direction by the Court was "Plaintiff's Proposed Instruction 30B", which was given as amended (Tr. 1760-1761):

"Now, coming to the contract here. In connection with the flood on January 9, 1953, the plans and specifications of the Folsom Dam documents, which include the contract, the plans and specifications, Supplemental Agreement No. 1, and change orders required as to the upstream cofferdam that Merritt-Savin, the contractor, build an upstream diversion cofferdam at a specified location with a minimum elevation of 237 and a maximum elevation of 250. Subject only to these limitations the defendants were charged with the responsibility and had the discretion to design an upstream cofferdam of any type, to construct the cofferdam and to select the materials to be used in the construction of it. Once having completed its construction, the defendants had discretion on the operation and maintenance of the upstream cofferdam above elevation 237 and below elevation 250, which included the discretion to determine whether the upstream cofferdam would be voluntarily breached, or over-topped at elevation 250 or at any elevation down to elevation 237.

Now as I say, here, this is an instruction concerning the legal interpretation of the contract, and I am not here in any way attempting to invade your province as to determining what the facts were."

Appellants cite the giving of this instruction as their "Specification of Error No. 2" (Brief for Appellants, pp. 5-6).

Actually, this instruction was merely an interpretation of the contract documents, which was based entirely upon the undisputed provisions thereof, or upon the concessions or stipulations of the Appellants. It

did not deprive the jury of the right to decide any factual question.

As indicative of the scope of the concessions and stipulations of the Appellants we refer to the following:

(1) The stipulation by Appellants that no representative of the Corps of Engineers directed the increase in the elevation of the upstream cofferdam (Tr. 1086-1087);

(2) The concession by Appellants that they had discretion in the selection of materials to be used (Tr. 1412); and

(3) The concessions made by Appellants in their Brief (pp. 10 and 17) that they had complete discretion as to certain of Appellee's charges of negligence.

In view of the full extent of these stipulations and concessions, it is difficult to conceive that Appellants remain serious in claiming this to have been error. Seemingly confirmatory of this view is the fact that they do not set forth any specific discussion of the subject in their Brief.

B. Appellants State No Reason for Raising Their "Specification of Error No. 3."

As their "Specification of Error No. 3" Appellants cite in their Brief (pp. 6-7 and Appendix pp. iv-v) the giving of an interpretive instruction outlining generally the inter-relationship between the various contracts that were referred to at the trial.

Appellants did not dignify this specification with any specific discussion whatsoever, and none appears appropriate herein.

C. Appellants' Instruction on the "Government Contract Defense" Was Improper and Not Germane in View of Their Own Concessions and Stipulations.

Finally, as to Appellants' "Specification No. 1." They urge that error was committed because the trial judge rejected their proposed "Instruction No. 13—Subject: Governmental Defense Doctrine" (Brief for Appellants, pp. 4-5, Appendix, pp. i-ii).

This instruction is, as its title indicates, simply a recital in instruction form of their "government contract defense" as they would have applied it to their case.

The trial judge explained with clarity his view of both the alleged defense and of proposed Instruction No. 13, when he said (Tr. 1410-1411):

> "I have to make the basic decision and *my first impression here is that this government contract defense or governmental defense doctrine, in view of the concessions of the party, is not really a germane issue.* And I suppose I am influenced in that by two or three of the stipulations and positions that the parties have taken without equivocation."

We have spelled out above the details of the stipulation during the trial and the concessions in the Brief for Appellants (pp. 10 and 17) which support the conclusion that the "government contract defense" was not properly an issue at the trial (supra, pp. 20-24). For all of those reasons it would have been error had the trial court given proposed Instruction No. 13.

As we have pointed out previously (supra, pp. 20-22), there is an additional ground upon which this instruction must have been rejected (supra, pp. 20-22). It was not qualified in its statement, so as to apply only to those two (or, possibly one) charges of negligence as to which Appellants did not concede that they had unlimited discretion. To the contrary, it was stated in language encompassing all charges of negligence.

In view of the concessions and stipulations of Appellants this was an improper statement. It is a well-established rule that if the instructions are defective in form or expression, or erroneous in law, the trial court may refuse to give them.

See:

Boyce v. The California Stage Co. (1864) 25 Cal. 460, 470;

People v. Hall (1892) 94 Cal. 595, 600-601.

Accordingly the trial court had the power to, and did properly, refuse to give Appellants' requested instruction on the government contract defense.

One additional point of clarification is needed. This proposed "Instruction No. 13" referred to "the directives of the Corps of Engineers to the defendants on January 9, 1953" (Brief for Appellants, Appendix, p. ii).

The suggestion that there were any directives to Appellants from representatives of the Corps of Engineers on January 9th is stated with a little more elaboration in their Brief (pp. 25-26), where they state:

"Appellee says we should have breached the cofferdam earlier, before the water reached damaging proportions. . . .*On the day in question the government directed us not to do so until the moment we did.*"

This statement as flatly contradicted by their own Project Manager, David E. Stinson. He was not present at the trial, but in the part of his deposition that Appellants' counsel read to the jury he stated (Tr. 1522):

"Q. *Turning now to the events of January 9, 1953, did anyone in the Corps of Engineers tell you that you could not breach the cofferdam until they instructed you to do so?*

A. *No, sir.*"

7. A Basic and Well-Recognized Exception to the "Government Contract Defense" Rule Would Have Rendered It of No Help to Appellants.

We have urged that, in view of the stipulations and concessions of the Appellants, the "government contract defense" was "not really a germane issue" (as the trial judge expressed it at Tr. 1410).

Even had this special defense been appropriate to the evidence adduced at the trial, there is a basic and generally recognized exception to the principle that would have prevented Appellants from urging it with any success in this litigation.

One of the authorities cited by Appellants is *Marin Municipal Water District v. Peninsula Paving Company* (1939) 34 C.A.(2d) 647, 94 P. 2d 404. They cite the case in support of the "government contract defense" (Brief for Appellants, p. 8).

This case states the general rule that they urge, but goes on to spell out in detail the exceptions to it, one of which is performance of the work "planned and specified in an improper, careless, or negligent manner." The full statement of the rule and the exceptions is as follows:

> "Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted and the contractor performs the work with proper care and skill and in conformity with the plans and specifications, but the work thus planned and specified results in an injury to adjacent property, the liability, if any there is, for the payment of damages, is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power (*Elliott v. County of Los Angeles* 183 Cal. 472 [191 Pac. 899]; *De Baker v. Southern Cal. Ry. Co.,* 106 Cal. 257 [46 Am. St. Rep. 237, 39 Pac. 610]); *but where the contractor departs from the contract plans or specifications or goes beyond them, or performs the work planned and specified in an improper, careless, or negligent manner, which results in injury to adjacent property, then he is responsible in damages for the tort he has committed.* (*Shaw v. Crocker,* 42 Cal. 435; *Reardon v. San Francisco,* 66 Cal. 492 [56 Am. Rep. 109, 6 Pac. 317]; *Eachus v. Los Angeles,* 130 Cal. 492 [80 Am. St. Rep. 147, 62 Pac. 829]; *Norton v. Ransome-Crummey Co.,* 173 Cal. 343 [159 Pac. 1177]; *Perkins v. Blauth,* 163 Cal. 782 [127 Pac. 50].) See also, *Kaufman v. Tomich,* 208 Cal. 19 [280 Pac. 130]."

II.

THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S AWARD OF DAMAGES TO COMPENSATE APPELLEE FOR THE ITEMS OF DAMAGES INCURRED BY IT AND DESIGNATED AS "LOSS OF JOB MOMENTUM AND INTERFERENCE WITH JOB EFFICIENCY" AND "PREMIUM TIME, AND OTHER COSTS TO AVERT 1954-55 WINTER LOSSES."

Appellants challenge a total of $110,000.00 of the $519,761.73 judgment because they claim that "the evidence fails to contain proof of these sums of damages" (Brief for Appellants, p. 33).

Actually, they are challenging two separate items of damage, both of which types of damage occurred upon each of the floods on January 9th and May 20th. Consequently, they attack a total of four items of claimed damage. These four items were stated and claimed by plaintiffs (and, incidentally, awarded by the jury), as follows:

	Jan. 9, 1953 Cofferdam Collapse	May 20, 1953 Cofferdam Collapse
"Premium time and other costs to avert 1954-55 winter losses"	$50,000	$5,000
"Loss of job momentum and interference with job efficiency"	50,000	5,000

Appellants state that "the only evidence to support the four round figures which total $110,000 is the testimony of Mr. James." (Brief for Appellants, p. 33)

This statement is simply untrue.

1. Appellee's Project Manager Testified in Detail as to the Nature of the Resultant Damages That Were Actually Incurred—Including Those Items That Appellants Now Challenge.

As to the *actual occurrence* of the four challenged items of damage as a direct result of the floodings of Appellee's work area on both January 9th and May 20th, the record is clear and the testimony not even disputed. It is clear beyond any possible challenge that on both occasions *substantial damage was actually suffered* by appellee within the scope or type of injury designated as "Premium time and other costs to avert 1954-55 winter losses" and "Loss of job momentum and interference with job efficiency."

Quite evidently Appellants do not seriously challenge the contention that the record shows beyond dispute that such damage was actually suffered in a substantial amount. They virtually concede it, saying:

> "Conceding, for the sake of argument, that *appellee suffered some damage of the types indicated,* we submit that the evidence fails to establish the amount of such damage" (Brief for Appellants, p. 37).

The uncontroverted testimony of Earl M. Jennett, Appellee's Project Manager and responsible managing agent at the job site, clearly and unequivocally proved that the two collapses of Appellants' upstream cofferdam on January 9 and May 20, 1953 caused Appellee to sustain damages convertible to dollar amounts by having to pay premium time and other costs to avert the 1954-55 winter losses, and by loss of job momentum and interference with job efficiency,

which payments and losses Appellee would not have incurred but for the two cofferdam collapses. It is significant to note that Appellants elected not to cross-examine Mr. Jennett on this particular portion of his testimony. His testimony stands clear and unrefuted. Appellants did not call any witness to challenge, minimize, or deny any of Mr. Jennett's statements that such damages were actually incurred as a direct result and consequence of the two floods.

Mr. Jennett also carefully explained his method of keeping an accurate record with respect to the damages suffered, including the four items challenged by Appellants. This was his testimony concerning these items of damage and the method of keeping records of them (Tr. 455):

> "Q. And as these piles were bought and other expenditures made after the flood, were the items of expense entered into the books of account?
>
> A. Oh, yes.
>
> Q. That is in the books that were kept on the job?
>
> A. Yes.
>
> Q. And this was done generally by Mr. Chambers (Appellee's Job Accountant, Tr. 454) under your direction?
>
> A. It was done by Mr. Chambers under my direction."

With regard to premium pay Mr. Jennett stated (Tr. 455-456):

> "Q. Did you incur in the period after the flood certain wage increases that were paid to workmen in the additional period required because of the delay?

A. Yes we did. (588)

Q. And in the normal keeping of your books of account are records kept on wage increases and the amount paid to each man?

A. Oh, yes, there is a labor contract that shows the date of the increases and the effective date of the increase.

Q. *And after the work had been shut down by reason of the flooding, did you work extra shifts and work overtime and otherwise incur what is known as premium pay?*

A. *Yes, we had—we had a great deal of that because while you might get an extension of contract time, you still have periods of weather that you have to work to and get some one part of your operations done, or maybe three or four different operations completed by a date due to weather conditions and so forth. So we did have to work a considerable amount of overtime; we had to work around the clock where we would have to pay shift premium, because in your operating engineers' union, for instance, you pay eight hours for seven hours work. So when you put on your second and third shifts you would pay eight hours and get seven hours work, so that runs up your cost per hour considerably.*

Q. *And were these extra shifts that you worked as a result of the delay incident to this flood?*

A. *Yes. On the majority of operations they were.''*

With regard to loss of job momentum and interference with job efficiency Mr. Jennett testified as follows (Tr. 457):

''Q. Mr. Jennett, is it correct that the result of the flood (589) and the condition of your work

area after it happened *caused any dislocation of your work progress schedule?*

A. *Well, there is no question that it dislocated our work schedule. It forced us to lay all of our men off; in fact, the day after the flood we sent telegrams to all of our hourly people not to report to work Monday morning because we just didn't have any place to work them. And our weekly people only came back, or monthly people came back, and as a result a great many good men we had went to other jobs, and it was quite some time before we got them back, if at any time, and people that were accustomed to working in this particular operation of ours, which required a certain amount of breaking in and good hard work in instruction and supervision on the part of the foreman—it definitely caused an inefficiency and it took us quite awhile to get back to where we were, and it has an effect, generally, I think, on the morale of your monthly people. They are all extremely interested, they are a wonderful, wonderful group of fellows I feel, in this construction business. It's their life——. . .*

Q. Did these conditions that you have just referred to have a dollar value or a dollar sign on them from the contractor's point of view?

A. Yes.

Q. (Tr. 458) Explain that.

A. Well, if you have—if you are inefficient, if you are starting out with a new crew it is like starting a new job again; it takes a long time to get your crews to the point where they know exactly what they are doing, to get acquainted with their foremen, to have the foremen get acquainted with them to the point of communicating properly to get the best efforts out of these people."

Mr. Jennett stated that the same items of damage were sustained after the May 20, 1953 flood (Tr. 473):

> "Q. Now, in addition to the specific items for removing the equipment, cleaning up, and unwatering, did the May 19 flood cause a general slowing down of the planned progress of the work?
>
> A. I would say yes, and it is bound to, because any interruption like that certainly slows you (607) down.
>
> Q. And did that piling up of the water and the muck and the debris in your hole interfere with the efficiency of your job as it had been planned?
>
> A. Well, it certainly interfered with the efficiency of the job until we got it all cleaned up and we got back to the same point that we were in before, because, I think most of you know, pouring concrete for the Bureau of Reclamation or the Corps of Engineers or any contracting agency, there are very detailed requirements before you can get an approval to place your next lift of concrete. It has to just be about clean enough so you could eat off of it."

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2. Mr. Harry James, Assistant to Appellee's General Manager, Testified to Both the Actual Occurrence of the Challenged Items of Damage, and Their Dollar Amount.

As to the occurrence of the challenged items of damage, in addition to Project Manager Earl M. Jennett's uncontradicted testimony, Appellee also presented the testimony of Harry James, the Assistant to the General Manager of Guy F. Atkinson Company. Mr. James had been with Guy F. Atkinson Company

for 27 years. He operated out of the head office in South San Francisco, and the company's books of account were kept in his charge and the General Manager's. (Tr. 588-590)

Mr. James produced at the trial the pages from the company's books of account relative to the Folsom Powerhouse Project. He testified to the manner in which the books of account were kept (as had Mr. Jennett), and presented for admission into evidence the pages from the ledgers listing the record of the items and amounts of damages due to the two floodings at Folsom Powerhouse. He also identified and testified in detail concerning a summary sheet entitled "Folsom Powerhouse, Summary of Damages Resulting From the Failures of the M.C.S.-Savin Cofferdams on January 9 and May 20, 1953" (introduced in evidence as Exhibit A-208). He identified each item of damage listed, testified as to the nature of each item, and related what the ledger sheets reflected in each case as to dollar amount (Tr. 590-604).

Proceeding down the list of items of damage, Mr. James eventually testified specifically concerning the four items of damage that Appellants now challenge. As to them he testified (Tr. 604-606):

> "Q. The next item that you show under the damages (764) resulting from the January 9th flood is No. 6 listed as 'Premium Time and Other Costs to Avert 1954-1955 Winter Losses,' and you reflect the sum of $50,000. Would you explain that?
>
> A. That is not a calculated figure as the preceding ones were. It is an estimate based on the

judgment of our management of what it cost us in premium payroll payments largely, such as the premium cost of working on Saturdays and on some Sundays; the premium cost of working shift work, that is, multiple shifts, two or three shifts per day, as compared to a normal single-shift operation. All of those things are situations under which you pay your workmen from one and a half to two times their normal wage rate. Let me correct that. If it is Saturday and Sunday work, that is true. For shift work typically you pay a workman eight hours' pay for seven hours' work so that——

Q. On the second shift?

A. With various crafts it is different. They are not uniform, but the typical one, as I mentioned, is that—and it may apply to all three shifts; there is where the crafts differ, I believe, but where you are working multiple shifts, you get less than a full eight hours' work for eight hours' pay and that premium is an added cost. *Those things were necessary in order to try to get the job back on schedule, or as nearly as possible,* and they were largely expended in the driving of the tunnels, the tunnels that bring the water into the (765) powerhouse, and then, toward the end of the job, in doing the excavation for the tailrace channel which could not be done until the cofferdam cells had been removed because it went right through where they were located. *It was necessary to expend this additional money in order to complete the job, and particularly to get the tailrace excavation out of the way before the flood season of 1954 and '55 descended on us when we would not have a cofferdam to protect the work.*

Q. *And is it your statement that except for the delays caused by these two floods, you would not have encountered these additional expenses?*

A. *Except for the delays which forced us to speed up the work to avoid that winter situation. And I would like also to say this: That $50,000 here does not represent the entire cost of such overtime premium and shift differential pay.* We felt that certainly we would have been involved in some of that sort of cost in any event, and in arriving at this figure our management decided on $50,000 as being a reasonable portion of the whole which was estimated to be perhaps $70,000. (766)

Q. *In the instance of this item, Mr. James, you have stated that it is not what you call a calculated figure, at least I take it, upon a precise total?*

A. *That's right.*

Q. *But that it is an estimation of Management of a proper apportionment, is that correct?*

A. *That's correct.*

Q. *And in making that apportionment, have you related* it to actual expenditures reflected on the books as having been paid?

A. Well, *to this extent: It is substantially less than the actual cost of the shift differential and the overtime premiums that were expended.* Those amounts during the summer period of 1954, when the tail race excavation was being taken out, at that time alone, amounted to in the neighborhood of $50,000, and approximately a similar cost was involved in the penstock tunnel excavation speedup with $18,000 or $20,000.

Q. So that *this item, then, of $50,000, does not represent the total actually paid, but rather is an*

apportionment based upon judgment?

A. *That's correct.''*

Concerning the damage incurred on January 9th because of "Loss of job momentum and interference with job efficiency'' Mr. James testified (Tr. 606-608):

"Q. Coming to the seventh item listed on Exhibit A-208 in evidence, under 'Damages due to the cofferdam failure on January 9th,' you list item 7, designated as 'loss of job (767) momentum and interference with job efficiency,' and here again you reflect the sum of $50,000.

Would you explain that, please?

A. *That is similarly an amount that was arrived at through the exercise of the judgment of the Management of the job in an effort to evaluate some factors that are not really susceptible to calculation but can be gauged from experience on construction jobs and in that work.*

They represent the loss of the efficiency of our workmen during the period following the flood. They represent what we have called the loss of momentum, which might also be described as the effect of being off balance and off schedule, and they also include such items as the cost of going out and, after the layoff that resulted from this flood, having to recruit and round up and train a new crew, and of having to weed out the new men that you have got who were undesirable for one reason or another, and find someone else.

That sort of thing, which I don't think anyone could possibly go on a job and calculate, except through arbitrary factors.

The figure, I have been told, was based largely on an over-all sort of look at the loss of efficiency . . .

Q. (By Mr. Johnson): *Now, in the instance of this item, Mr. James, the sum of $50,000 is based upon a judgment based upon experience of your company's administrative staff, is that correct?*

A. *That's correct.*"

Mr. James' testimony was to the same effect concerning these same items of damage as incurred in the flood on May 20th (Tr. 609-610):

"Q. Now coming to the next two items, 2 and 3, which again are listed as, 'premium time and other costs to avert the 1954-55 winter losses,' in the amount of $5,000, and the third item, 'loss of job momentum and interference with job efficiency,' in the amount of $5,000, is the explanation in those two instances the same as on the similar items on January 9th?

A. The same, except that the period of time involved in each instance would be less.

Q. And the amount is less?

A. The amount is less."

The testimony of Mr. Jennett and Mr. James combines to complete the proof that the two collapses of the cofferdam caused substantial damage to Appellees by requiring them to pay premium time and other costs to avert 1954-55 winter losses, and by losing job momentum and interfering with job efficiency. These damages were proved to amount to $110,000 by testimony that was neither objected to nor contradicted.

Appellants made no attempt to challenge these figures, or to introduce evidence that they were excessive. Certainly, if Appellants seriously disputed either that

such items of damage occurred or the amount, they had adequate opportunity to do so. In this connection it is important to note that Appellee, pursuant to Appellants' Motion to Produce dated February 4, 1959, one year before trial, turned over to Appellants' counsel "all and whatever documents, papers, books, accounts, correspondence, bills, vouchers, and other records upon which the plaintiff [appellee] predicates and bases its alleged damage in this case." In view of this length of time within which to prepare to meet Appellee's claims for damage, it would seem Appellants have little to complain about in so far as damages are concerned, particularly where they failed to avail themselves of the opportunity to produce any witness or other form of evidence to prove that any of Appellee's damage calculations were excessive, unsupported by the facts, or not the best evidence.

3. Leading California Precedents Support Our Contention That the Evidence on the Issue of Damages Is More Than Sufficient to Support the Judgment.

An examination of the controlling decisions of the California courts will convince anyone that they support our contention that the testimony of Mr. Jennett and Mr. James, as quoted at length above, is ample to support the jury's verdict on the challenged items.

The rule as to measuring damages for property and business loss caused through negligence is stated in *Hanlon D. & S. Co. v. Southern Pac. Co.* (1928) 92 Cal. App. 230, 268 Pac. 385. There plaintiff recovered

damages suffered from fire when defendant's train blocked the entrance to plaintiff's warehouse. Defendant contended that the damages suffered were speculative, contingent and remote. The court rejected this contention saying (p. 235):

> "When the acts complained of are the proximate cause of the damage suffered the guilty party is not to be relieved merely because the extent of the damage cannot be accurately measured. (17 Cor. Jur., p. 756, 759; *Learned v. Castle,* 78 Cal. 454, 461 [18 Pac. 872, 21 Pac. 11].) It has been said that where the circumstances are such that an exact computation of the damages cannot be made, *'the approved practice is to leave it to the good sense of the jury, as reasonable men, to form from the evidence the best estimate that can be made under the circumstances, as a basis of compensatory damages for the actionable injury.' (Jenkins v. Pennsylvania R. Co.,* 67 N.J.L. 331 [57 L.R.A. 309, 51 Atl. 704, 705].)"

In *California O. Co. v. Riverside-Portland Cement Co.* (1920) 50 Cal. App. 522, 525, 529, 195 Pac. 694, after recognizing the principle of the Hanlon decision, a similar conclusion as to damages was reached. Plaintiff recovered damages for injuries to plaintiff's orange orchard caused by the deposit on the trees of cement dust from defendants' cement mill. The items of damages recovered were for loss and injury to the crops for a three year period, increased labor cost in the care of the trees, and for injury to the trees which caused a decrease in crops.

(See, *Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal. 2d 158, 174, 89 P. 2d 386; *Elsbach v.*

Mulligan (1934) 58 C.A. 2d 354, 366, 13 P. 2d 651; *Pye v. Eagle Lake Lumber Co.* (1924) 66 Cal. App. 584, 590, 227 Pac. 193.)

In *De Flavio v. Estell* (1959) 173 C.A. 2d 226, plaintiff, a general contractor, commenced an action for breach of a building construction contract to recover damages for loss of prospective profits. The contention was made that plaintiff failed to establish with reasonable certainty that there were damages. This contention was rejected by the court which states (p. 232):

> "'It is no objection to [the recovery of damages] that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible.' (*McConnell v. Corona City Water Co.,* 149 Cal. 60, 66 [85 P. 929, 8 L.R.A. N.S. 1171]; see Civ. Code, § 3300; *Buxbom v. Smith,* 23 Cal. 2d 535, 541 [145 P. 2d 305].) Because it is difficult to measure with mathematical exactitude the detriment suffered in cases of this character, 'it is frequently held that a reasonable certainty only is required.' (*Hensler v. City of Los Angeles,* 124 Cal. App. 2d 71, 88 [268 P. 2d 12].) In such cases the injured party is entitled to recover damages for the profits he would have made 'by showing how much less than the contract price it will cost to do the work or perform the contract.' (*McConnell v. Corona City Water Co. supra.*)"

The same principles were applied in *Smith v. Shasta Electric Co.* (1961) 190 A.C.A. 810. The plaintiff sought to recover damages for the destruction of

a sawmill destroyed by fire caused by defective wiring negligently installed by defendant. In affirming the judgment the court rejected the argument that plaintiff was not entitled to damages for lost profits stating (p. 814):

> "A plaintiff's right to recover damages for a loss of anticipated profits occasioned by reason of the defendant's tort is now, in contradistinction to earlier decisions, generally determined by the same rules that govern his recovery of damages for other forms of detriment caused by the defendant's conduct. Accordingly, the plaintiff may recover for a loss of anticipated profits if his loss in this regard has directly and necessarily resulted from the defendant's wrongful act. *However, the evidence he presents to establish his loss must not be uncertain or speculative. This rule does not apply to an uncertainty concerning the amount of profits that the plaintiff, but for the defendant's act, would have derived from a particular transaction; it refers, instead, to uncertainty or speculation as to whether or not the loss has actually occurred as a result of that act.*"

4. The Cases Cited by Appellants Actually Support the Contention That the Evidence on the Challenged Items Was More than Sufficient.

In view of the uniformity with which the rule is accepted, it is not surprising to find that, upon a careful reading, even the authorities relied upon by Appellants actually support our contention that the evidence is more than sufficient as to the challenged items.

They cite *Shannon v. Shafter Oil & Refining Co.* (1931) 51 F. 2d 878. In that case, the lessor and

owner of oil producing property brought an action to recover damages for the value of gas which the lessor alleged the lessee permitted to escape and waste. The jury rendered a verdict for defendant lessee. On appeal lessor argued that some gas escaped and therefore he was entitled to some damages. The court rejected this argument, holding that the evidence did not afford the jury any reasonable basis to compute the loss from escaping gas. With regard to damages, the court stated as follows (p. 881):

> "We recognize the rule contended for by plaintiff that, where there is proof, within the permissible range of certainty, that a right of a plaintiff has been invaded, he should not be denied a substantial recovery because of the difficulty in accurately measuring his damages. *The later authorities recognize the distinction between the case where uncertainty exists as to whether any substantial damage resulted, and the case where the uncertainty exists only as to the extent of such damage.* In *Hoffer Oil Corp. v. Carpenter,* 34 F. (2d) 589, 592, we held that one who had broken his contract could not escape liability because of the lack of a perfect measure of damage. The Eighth Circuit had theretofore so held. *Calkins v. Woolworth,* 27 F. (2d) 314, 320. Williston, in his Work on Contracts, says: *'Where it is clear that substantial damage has been suffered the impossibility of proving its precise limits is no reason for denying substantial damages altogether.'* Williston on Contracts, Vol. III, p. 2401.
>
> "In 8 R. C. L. p. 441, the author states: 'Formerly the tendency was to restrict the recovery to such matters as were susceptible of having at-

> tached to them an exact pecuniary value, *but it is now generally held that the uncertainty referred to is uncertainty as to the fact of the damage and not as to its amount, and that, where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. This is particularly true where, from the nature of the case, the extent of the injury and the amount of damage is not capable of exact and accurate proof.'* "

In another case cited by Appellants a similar statement of the applicable principles was made. This case is *Kelite v. Binzel* (1955) 224 F. 2d 131. There, plaintiff commenced an action for damages sustained when defendant delayed delivery of plaintiff's mail and converted certain property. The verdict was in favor of plaintiff. On appeal the judgment was reversed on the grounds that the instructions on punitive damages were prejudicial. However, the court rejected the contention that the issue of actual damages resulting from the delay in delivering the mail should have been kept from the jury because there was no proof of damage. In so holding the court said (pp. 144-145):

> "As for appellants' contentions that no substantial damages were proved under counts 1 and 4, and that this issue should have been kept from the jury by the requested instructions, we find no merit in them. Binzel did prove at least the loss of interest on the checks delayed in the mails, amounting to ten to twenty dollars, very substantial annoyance and inconvenience in having to have his mail delayed and photostated, and invasion of his privacy. This was certainly suffi-

cient without more to support an award of compensatory damages on these counts. Appellants objected to, and the court properly excluded, evidence of diminished profits of Binzel's business, because it was too remote and speculative, since he had changed to another line of cleaning compounds. This is obviously a difficulty present in proving damages for any such disruption of business. The law does not require an impossible precision in the proof of such damages. We think the proper principle is stated in Restatement, Torts § 912, Comment d:

'Where there is an interference with intangible rights, such as on interference with a business, there may be great difficulty in proving the existence or amount of loss with any degree of certainty. * * Although in such cases, the burden is on the injured person to prove with a fair degree of certainty that the business or transaction was or would have been profitable, it is not fatal to the recovery of substantial damages that he is unable to prove with definiteness the amount of the profits he would have made or the amount of harm which the defendant has caused. It is only essential that he present such evidence as might reasonably be expected to be available under the circumstances.'* "

A third case cited by Appellants which actually supports our position is *United Electrical, R & M Workers v. Oliver Corp.* (1953) 205 F. 2d 376. The Oliver Corporation commenced an action for breach of contract to recover from defendant unions damages that it incurred during a strike. The judgment entered on a jury verdict for plaintiff was affirmed

on appeal. Defendants contended on appeal that the measure of damages was improper. The court disclaimed this contention and held as follows (p. 389):

> "Implicit in defendants' contention is an admission of the fact of damage to the plaintiff. Their objection goes only to the method by which the amount of plaintiff's damage is computed. *In determining the amount of an admitted damage mathematical accuracy is not required of juries. It is sufficient that a reasonable estimate based on relevant factors is reached.* A jury may not render a verdict based on speculation or guesswork, even where the defendant by his own wrong has precluded a more precise computation of damages. 'But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances juries are allowed to act on probable and inferential as well as (upon) direct and positive proof.' *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 264, 66 S.Ct. 574, 580, 90 L. Ed. 652."

Fortunately, a California case cited by Appellants supports our position. *Stott v. Johnston* (1951) 36 Cal. 2d 864 provides a specific example of the application of the above principles with regard to damages. Plaintiff, a painting decorator, brought this action against defendant, the operator of a paint company, for breach of warranty, to recover damages for, among other things, loss of good will. The jury returned a verdict of $10,000 for loss of good will. In affirming this portion of the jury award the court held (p. 875):

"The propriety of the allowance of $10,000 to plaintiff for the loss of good will must be considered in relation to the nature of the evidence available to plaintiff in proof of this issue. Analogous considerations have arisen in cases where recovery for loss of future profits was sought, and *the courts have been reluctant to reverse a reasonable damage award because the precise amount of damage was not definitely ascertainable. In this regard it appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment.* (See Anno. 78 A.L.R. 858; 25 C.J.S. § 28, pp. 493-496.)"

As to the rest of the cases relied upon by Appellants, there is nothing in *Krcmar v. Wisconsin River Power Co.* (1955, Wis.) 72 N.W. 2d 328, 331 that alters the above stated principles with regard to damages. The court in the *Krcmar* case reversed a judgment for plaintiff and ordered a new trial on the issue of damages on the ground that the evidence failed to support the jury's finding as to damages, since plaintiff did not show that the negligent act of defendant in allowing water to seep on his farm land was the proximate cause of the damages claimed.

In *Goynes v. St. Charles Dairy* (1940, La.) 197 So. 819, the court reversed an award of $150 for general damages in an action for a negligent automobile collision on the ground that there was no evidence on

which to sustain the judgment. *Albanese v. New Haven, etc. Co.* (1959, Conn.) 152 A. 2d 505 is to the same effect, wherein the court held that there was no evidence to support the full award for damages to plaintiffs' house caused by defendants' blasting operations.

In *McCracken v. Stewart* (1950, Kansas) 223 P. 2d 963, an action for personal injuries, plaintiff sought damages for prospective profits. On this issue plaintiff testified that he was a partner in the janitorial supply firm, and over the objection of defendant's counsel, stated from memory, his average daily income immediately prior to the date of the accident. Nowhere did he state that he had lost the business and financial records of his firm. Nor did the record on appeal show whether he was testifying as to gross income, net income, partnership or personal income. The court held that this evidence was insufficient to support the award of damages for prospective profits because it was based on mere opinion without regard to specific facts or knowledge upon which the opinion was based.

Clearly these cases do not affect or relate to the basis of the damage award in this case.

5. Where Substantial Damage Has Been Proved, a Substantial Recovery Is Not to Be Denied Because of Difficulty in Measuring Its Extent With Exactitude.

All of the later and better reasoned authorities, whether those cited by Appellants or those relied upon by Appellee, recognize the rule that, where a party plaintiff has proved by proper evidence that he

has suffered a substantial damage, he should not be denied a substantial recovery because of some difficulty in measuring with accuracy and exactitude the extent of his damage in dollar value.

Recognition must be given to the distinction between a case of uncertainty as to whether damage actually resulted, and one of uncertainty existing, if at all, only as to the extent of the damage.

Having in mind both the proper distinction and the true rule of damages, Appellants' argument on the damage issue cannot be sustained. Both Mr. Jennett and Mr. James testified without contradiction as to the actual occurrence of the damage items now challenged. The undisputed physical evidence supported their testimony, and proved beyond question that the types of damage that were claimed had actually occurred, and that it was very substantial.

Concerning the extent of the damage, or its translation into actual dollar value, Harry James testified that the four challenged items aggregating $110,000 were:

> ". . . arrived at through the exercise of the judgment of the Management of the job in an effort to evaluate some factors that are not really susceptible to calculation but can be gauged from experience on construction jobs and in that work." (Tr. 607, 623.)

In practical effect what Mr. James stated was that the amounts of the four challenged items were measured and determined by Appellee in exactly the same manner in which any experienced contractor prepares

his bid on even the largest and most complicated construction projects—by the exercise of top management's judgment based on past experience.

The method of measuring and determining the amount of damages claimed by Appellee for the four challenged items, as testified to by Mr. Harry James, was strictly in conformity with that method of admeasurement of dollar value which years of experience of the best minds of the construction and engineering professions have found to be best suited to the accurate measurement of cost items with the maximum of exactitude. It is submitted that this characterization of it is certainly more apt than Appellants' statement that:

> "It is a very accurate description of the kind of evidence which is held to be insufficient to sustain an award of damage" (Brief for Appellants, p. 40).

That Appellants themselves were not convinced of the accuracy of their characterization of Mr. James' testimony was demonstrated by the fact that, at the trial, they:

(1) Failed to make any objection that it was not the best evidence;

(2) Failed to move to strike it from the record;

(3) Failed to cross-examine him in greater detail as to the basis and details of his figures; and

(4) Failed to call any witness to contradict, or even to minimize, his admeasurement of the dollar value of damages on the four challenged items.

CONCLUSION.

1. As has been pointed out previously, the Brief for Appellants presented only one issue, other than the attack of certain items of damages.

They stated and re-stated it many times. Always it was the same: that whatever they did or did not do on January 9th, 1953, was done or was not done because they were bound by the provisions of a government contract.

This was their "government contract defense." That is all that there is to it, except that because of it they claim that they were exempted from liability for negligence.

Even in their own "Conclusion" they still assert it, and claim that they "have been subjected to an enormous verdict without their chief defense, namely that they acted in compliance with the government's directions."

To urge that point seriously is to ignore, or not to appreciate the significance and the import of their own stipulations and concessions. The doctrine upon which they place exclusive reliance on this appeal is simply inapplicable to this litigation because of their own stipulations and concessions, as well as the plain language of the contract documents.

Without it there is no support for their claim—nor do they urge that there is.

2. As to their attack upon the items of damage: again they have completely overlooked material evi-

dence that was not disputed, or even minimized. In this case it was substantial evidence (both oral, pictorial and physical) showing that the types of damages claimed actually occurred.

Both the evidence as a whole, and the controlling leading authorities (including those cited by the Appellants), support the Appellee's showing as being more than sufficient.

3. No reason has been shown for reversing or reducing the verdict and judgment.

The judgment should be affirmed.

Dated, San Francisco, California,
June 29, 1961.

Respectfully submitted,
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